

## Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 EURE-00 SSO-00 NSCE-00 USIE-00  
INRE-00 AID-05 CEA-01 CIAE-00 COME-00 EB-07 EA-07  
FRB-03 INR-07 IO-13 NEA-10 NSAE-00 OPIC-03 SP-02  
TRSE-00 LAB-04 EPG-02 SIL-01 AGRE-00 OMB-01 STR-04  
XMB-02 NSC-05 SS-15 L-03 OIC-02 /110 W  
-----127184 291629Z /43

O 291546Z JUN 77

FM AMEMBASSY PARIS

TO SECSTATE WASHDC IMMEDIATE 4932

C O N F I D E N T I A L SECTION 01 OF 02 PARIS 19048

PASS EB FOR BOEKER; TREASURY FOR HUFBAUER

USOECD

E.O. 11652: GDS

TAGS: EINV, OECD

SUBJECT: OECD COMMITTEE ON INTERNATIONAL INVESTMENT  
AND MULTINATIONAL ENTERPRISES (CIME) - SECRETARIAT  
TAKES LIBERTIES IN INTERPRETING THE GUIDELINES FOR  
MNE'S.

REF: A) IME(77)12, B) OECD PARIS 9796, C) OECD  
PARIS 9746

1. THEODORE VOGELAAR, SPECIAL CONSULTANT TO SECRETARY-  
GENERAL ON INTERNATIONAL INVESTMENT AND MNE'S, HAS  
PUBLISHED IN MAY, 1977, ISSUE (NO. 86) OF "THE OECD  
OBSERVER" AN ARTICLE, IN HIS NAME, ENTITLED "MULTI-  
NATIONAL ENTERPRISES: THE GUIDELINES IN PRACTICE."  
THE ARTICLE DRAWS HEAVILY ON REF A (WITH SOME PASSAGES  
VIRTUALLY IDENTICAL), WHICH IS A SECRETARIAT RESTRICTED  
DOCUMENT SCHEDULED FOR DISCUSSION AT NEXT CIME MEETING  
ON JULY 7 AND 8.

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2. DESPITE DISCLAIMERS RECOGNIZING THAT CIME "IS NOT  
IN ANY SENSE A TRIBUNAL, AND COULD NOT PASS JUDGMENT  
ON THE CONDUCT OF A PARTICULAR ENTERPRISE," ARTICLE,  
AND REF A UPON WHICH IT IS BASED, SUGGESTS "INTERPRE-  
TATIONS" OF THE OECD GUIDELINES FOR MNE'S USING  
BADGER BELGIUM CASE AS POINT OF DEPARTURE. BOTH THE

ARTICLE AND REF A GO WELL BEYOND THE UNDERSTANDING REACHED AT THE LAST MEETING OF CIME (REF C), WHERE IT WAS CLEARLY STATED IN CHAIRMAN'S SUMMARY (REF B) THAT CIME WOULD ONLY "CONSIDER FURTHER THE QUESTIONS THAT HAD BEEN RAISED WITH A VIEW TO RESPONDING TO THE BELGIAN PRESENTATION." FURTHER, THE CHAIRMAN'S SUMMARY NOTED, "THAT THE COMMITTEE WOULD CONTINUE TO REFLECT UPON THE APPLICATION OF THE GUIDELINES, IN THE LIGHT OF THE CASE SUBMITTED BY THE BELGIAN AUTHORITIES." FINALLY, AT THE LAST CIME (PARA 7, REF C) THE US DEL SPECIFICALLY STATED THAT "THE USG WOULD NOT ENGAGE IN INTERPRETATIONS (AS IN A COURT OF LAW) OF THE GUIDELINES, BUT ENTER ONLY IN A DISCUSSION OF THE GENERAL INTENT OF THE DRAFTERS WITH RESPECT TO THE RELEVANT SECTIONS OF THE GUIDELINES."

3. ARTICLE DISTILLS THE TROUBLESOME ESSENCE OF REF A; SEVERAL INTERPRETIVE STATEMENTS WITH RESPECT TO THE GUIDELINES ARE MADE. TWO STATEMENTS ARE ESPECIALLY PROVOCATIVE: A) IN DISCUSSING PARENT SUBSIDIARY RELATIONSHIP, VOGELAAR NOTES, "HOWEVER, THE GUIDELINES DO NOT GIVE A PRECISE LEGAL DEFINITION OF AN MNE, BUT ONLY A VERY GOOD DESCRIPTION OF THE MAIN ELEMENTS THAT SHOULD BE TAKEN INTO ACCOUNT IN DETERMINING WHAT SUCH AN ENTERPRISE IS. IT IS EQUALLY CLEAR THAT LINKS OTHER THAN FULL OWNERSHIP AND DIRECT CONTROL BETWEEN COMPANIES

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IN DIFFERENT COUNTRIES MAY CONSTITUTE A MULTINATIONAL ENTERPRISE, AND GRADUALLY, THE COMMITTEE WILL, IT IS HOPED, ELABORATE A DOCTRINE ON THIS AND OTHER MATTERS IN THE LIGHT OF THE CASES SUBMITTED TO IT." B) IN CONCLUSION, VOGELAAR STATES "THIS DOES NOT MEAN THAT PARTS OF THE GUIDELINES, THOUGH VOLUNTARY AT THE ORIGIN, MAY NOT, IN THE COURSE OF TIME - WHEN THEY HAVE BEEN FREQUENTLY APPLIED - PASS INTO THE GENERAL CORPUS OF CUSTOMARY INTERNATIONAL LAW EVEN FOR THOSE MULTINATIONAL ENTERPRISES WHICH HAVE NEVER ACCEPTED THEM."

4. COMMENT: IT IS CLEAR THAT VOGELAAR, WITH HIS HIGHLY PROVOCATIVE APPROACH, IS GOING WELL BEYOND THE

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FM AMEMBASSY PARIS

TO SECSTATE WASHDC IMMEDIATE 4933

C O N F I D E N T I A L SECTION 02 OF 02 PARIS 19048

INTENT AND SPIRIT OF THE DRAFTERS OF THE OECD INVESTMENT PACKAGE. BY SEEKING TO PUSH THE GUIDELINES BEYOND THEIR AGREED LIMITS, HE IS TRYING TO INSTILL IN THEM A CHARACTER THEY DO NOT HAVE. INTERPRETATION OF THE GUIDELINES (EVEN BASED ON A HYPOTHETICAL SITUATION) WAS NOT MANDATED TO THE OECD SECRETARIAT. IT IS STATED IN THE CONSULTATION SECTION ASSOCIATED WITH THE OECD GUIDELINES THAT THE CIME MAY "HOLD AN EXCHANGE OF VIEWS ON MATTERS RELATED TO THE GUIDELINES." NO PROVISION IS MADE FOR INTERPRETATIONS. TO ENGAGE IN SUCH AN EXERCISE IN A RESTRICTED OECD DOCUMENT (REF A) IS ITSELF HIGHLY QUESTIONABLE. TO UTILIZE THE SAME LANGUAGE IN AN OECD PUBLICATION (PRIOR, EVEN, TO VETTING IN CIME ITSELF) IS IMPROPER, IRRESPONSIBLE, AND CONTRARY TO OECD CUSTOM. OECD COUNCIL RESOLUTION C/M(62)11(FINAL) OF MAY 22, 1962 STATES THAT "RESTRICTED" OECD DOCUMENTS ARE "NOT TO BE COMMUNICATED EXCEPT FOR OFFICIAL PURPOSES." DERESTRICTION WILL OCCUR ONLY BY AUTHORITY OF THE SECRETARY-GENERAL AFTER CONSULTATION WITH RELEVANT COMMITTEES AND APPROVAL BY OECD COUNCIL (VIZ. C(74)133(FINAL)).

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5. RECOMMENDATION: IN THESE CIRCUMSTANCES, MISSION RECOMMENDS THAT A VIGOROUS LETTER OF PROTEST AND CONCERN BE SENT TO SECRETARY-GENERAL FROM AMBASSADOR. CONTENT OF LETTER WOULD SUMMARIZE ARGUMENTATION INDICATED IN PARAGRAPH 4 ABOVE, PARTICULARLY EMPHASIZING THREE ELEMENTS:

(A) THAT THE MANDATE OF CIME DOES NOT AUTHORIZE THIS COMMITTEE TO GO BEYOND EXCHANGING VIEWS ON THE MNE GUIDELINES AND A FORTIORI, THE SECRETARIAT IS NOT EMPOWERED TO SUGGEST "INTERPRETATIONS" OF THE GUIDELINES; (B) WHILE THERE MAY BE DIFFERING VIEWS AMONG NATIONAL DELEGATIONS TO CIME AS TO THE PRECISE MEANING OF EXCHANGING VIEWS IN THE COMMITTEE ON THE GUIDELINES AND IT IS APPROPRIATE FOR THE SECRETARIAT TO SUGGEST QUESTIONS FOR DISCUSSION TO THE COMMITTEE, AS THE COMMITTEE MAY DIRECT, IT IS HIGHLY IMPROPER FOR THE SECRETARIAT TO PUBLISH PARTS OF A RESTRICTED DOCUMENT INTENDED FOR COMMITTEE USE. THIS BREACH OF OECD PROCEDURES IS MADE EVEN MORE FLAGRANT BY FACT THAT THE RESTRICTED DOCUMENT IN QUESTION HAS YET TO BE DISCUSSED IN CIME, THAT IS PRIOR TO GOVERNMENTS HAVING AN OPPORTUNITY TO COMMENT ON IT; AND (C) THE EFFECT OF THE ARTICLE IS UNFORTUNATE IN THAT IT IS MISLEADING AS TO THE ATTITUDE OF NATIONAL GOVERNMENTS AND MAY GIVE A FALSE VIEW TO THE PUBLIC AND THE BUSINESS COMMUNITY ON THE WAY IN WHICH THE OECD COMMITTEE ON INTERNATIONAL AND MNE'S APPROACHES ISSUES WHICH ARISE UNDER THE MNE GUIDELINES. (NOTE: AS WASHINGTON AWARE, THIS IS NOT FIRST TIME VOGELAAR HAS STRAYED. THE EFFECT OF LETTER COULD BE, HOPEFULLY, TO CONSTRAIN ACTIVITIES OF VOGELAAR IN THE FUTURE IN THIS FIELD WITHOUT PRIOR AUTHORIZATION FROM CIME.)

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6. ACTION REQUESTED: MISSION WOULD APPRECIATE WASHINGTON COMMENTS AS SOON AS POSSIBLE ON THE PROPOSED LETTER. WASHINGTON AGENCIES MAY ALSO WISH TO CONSIDER RAISING THIS MATTER UNDER AGENDA ITEM 4 OF NEXT CIME. SALZMAN

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## Message Attributes

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